STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of SCHOOL DISTRICT OF SHULLSBURG Requesting a Declaratory Ruling Pursuant to Section 111.70(4)(b), Wis. Stats., Involving a Dispute Between Said Petitioner and SHULLSBURG EDUCATION ASSOCIATION	Case XI No. 30346 DR(M)-246 Decision No. 20120-A

Appearances:

Kramer Law Office, 1038 Lincoln Avenue, Fennimore, Wisconsin 53809, by Mr. John Kramer and Mr. Thomas L. Jones III,, appearing on behalf of the District.

Mr. Michael L. Stoll, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

The School District of Shullsburg filed a petition with the Wisconsin Employment Relations Commission on September 7, 1982, seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to its duty to bargain with the Shullsburg Education Association over certain portions of the Association's final offer. Hearing on said petition was held on December 20, 1982, before Peter G. Davis, of the Commission's staff. The parties filed post-hearing arguments the last of which was received on May 18, 1983. Based upon the record and the positions of the parties, the Commission makes and issues the following

FINDINGS OF FACT

1. That the School District of Shullsburg, herein the District, is a municipal employer having its offices at 444 North Judgement Street, Shullsburg, Wisconsin 53586.

2. That the Shullsburg Education Association, herein the Association, is a labor organization having its principal offices at Route 1, Barber Avenue, Livingston, Wisconsin 53554.

3. That the Association is the exclusive bargaining representative of certain teaching personnel employed by the District.

4. That during collective bargaining over the terms of a successor agreement between the District and the Association which would establish the wages, hours and conditions of employment of the District employes represented by the Association, a dispute arose between the parties as to the District's duty to bargain with the Association as to certain proposals. The parties were unable to resolve that dispute and the District ultimately filed the instant petition for declaratory ruling.

5. That during the December 20, 1982 hearing on the instant petition, the parties were able to resolve part of their dispute but that the underlined portions of the following proposals, as modified at or after the hearing, remain in dispute.

(1) ARTICLE III - ASSOCIATION RIGHTS

A. The Association and its representatives shall have the right to use school buildings for organizational meetings and activities related to the Association's responsibilities

and functions as the exclusive collective bargaining representative, at reasonable hours and locations. The Association shall make prior arrangements for the use of school buildings with the Administration.

. . .

C. The Association and its representatives shall not be denied access to school property for the purpose of engaging in organizational activities related to the Association's responsibilities and functions as the exclusive collective bargaining representative, provided that such access and activities do not interfere with school functions or activities. Association representatives who are not employes of the District shall notify the Administration of their presence and purpose in any school building.

D. Employes who are Association representatives shall be permitted to use school facilities and equipment (including typewriters, mimeographing machines and other duplication equipment) for organizational purposes related to the Association's responsibilities and functions as the exclusive collective bargaining representative, at reasonable times and with prior notice to the Administration, provided such equipment is not otherwise in use and that the Association shall pay for the cost of all materials and supplies incident to such use and repair of any equipment which may be damaged.

E. The Association shall have the right to post notices of activities and matters of Association concern on teacher bulletin boards. Subject to all applicable rules and regulations of the U.S. Postal Service, the Association shall have the right to commuinicate with bargaining unit members regarding matters related to the Association's responsibiltities and functions as the exclusive collective bargaining representative, through use of the District mail service and teacher mail boxes.

. . .

G. The District shall make a reasonable amount of time (not to exceed 30 minutes) available to the Association during the District's orientation program for new employes to describe and explain Association activities and services.

. . .

I. Each school year, the Association shall be provided with three (3) days of paid released time to be used by employes of the District who are officers or representatives of the Association for the transaction of Association activities related to the Association's responsibilities and functions as the exclusive collective bargaining representative. The use of such paid released time shall be at the discretion of the Association, provided that the Association gives the Administration at least twenty-four (24) hours advance notice of the intended use of such paid released time and that the use of such paid released time by Association representatives or officers does not unreasonably interfere with normal school functions. The Association shall assume the cost of substitute teachers, employed by the District to replace employes utilizing the paid released time authorized herein.

. . .

(2) ARTICLE IV - TEACHER RIGHTS

A. No teacher may be disciplined or discriminated against in regard to terms or conditions of employment by the District on the basis of the teacher's religious or political

affiliations (or the lack thereof), or aspects of the teacher's personal lifestyle, where such affiliations and/or lifestyle are substantially unrelated to the teacher's adequate performance of his or her job duties and responsibilities.

(3) ARTICLE VII - COMPENSATION

A.

. . .

6. Teachers to whom the District does not provide nine and one-third (9 1/3) hours of preparation time per week, during the regular teacher workday, shall receive compensation, in addition to their scheduled salaries, in the amount of one-fourth (1/4) of the teacher's regular hourly pay for each such quarter hour (or major fraction thereof) less than nine and one-third (9 1/3) hours per week provided by the District.

As used herein, preparation time provided by the District may include that amount of time during the regular teacher workday which occurs before and after the hours of the student school day during which teachers do not have other assigned duties.

As used herein, a teacher's regular hourly pay shall be determined by dividing the teacher's yearly (base) salary by the product of 180 (instructional days per year) x 8 (hours per workday).

For teachers with less than full-time contracts with the District, the amounts of preparation time and additional compensation provided for in this subsection shall be prorated according to the percentage of a full-time contract held by such teachers.

Any additional compensation earned by a teacher under this subsection shall be separately itemized and paid monthly by the District.

. . .

(4) ARTICLE X - STAFF REDUCTION POLICY

In the event the Board determines to reduce the number of employe positions (full layoff) or the number of hours in any position (partial layoff) for the forthcoming school year, the provisions set forth in this Article shall apply. Layoffs shall be made only for the reason(s) asserted by the Board, and not to circumvent the other job security or discipline provisions of this agreement.

. . .

D. Layoff Notices and Effective Date of Layoff.

1. Prior to implementing any layoff(s), the Board shall notify the Association in writing of the position(s) which it is considering for reduction. Thereafter, upon Association request, the Board shall meet with the Association to bargain concerning the impact of any staff reduction(s).

2. Layoffs of teachers shall be implemented in accordance with a time frame consistent with the provisions of sec. 118.22, Stats. The Board shall give written notice to the teachers it has selected for layoff for the ensuring school year on or before March 15 of the school year during which the teacher holds a contract. The layoff of each teacher shall

commence on the date that he or she completes the teaching contract for the current school year.

3. The Board shall simultaneously provide the Association with copies of all layoff notices which it sends to employes pursuant to this section.

6. That disputed proposals (1) in part, (2), (3), and (4) in part, as set forth in Finding of Fact 5, primarily relate to wages, hours and conditions of employment.

7. That disputed proposals (1) in part and (4) in part, as set forth in Finding of Fact 5, primarily relate to educational policy and/or school management and operation.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. That the disputed proposals referenced in Finding of Fact 6 are mandatory subjects of bargaining.

2. That the disputed proposals referenced in Finding of Fact 7 are permissive subjects of bargaining.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

DECLARATORY RULING 1/

1. That the District has a duty to bargain with the Association under Sec. 111.70(3)(a)(4), Stats., over the proposals referenced in Conclusion of Law 1.

2. That the District has no duty to bargain with the Association under Sec. 111.70(3)(a)(4), Stats., over the proposals referenced in Conclusion of Law 2.

Given under our hands and seal at the City of Madison, Wisconsin this 4th day of April, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

I separately concur as to proposal (4) and fully concur as to the remaining proposals.

_____
Marshall L. Gratz, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

1/ (Continued)

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Before entering into a specific consideration of each proposal, it is useful to set forth the general legal framework within which the issues herein must be resolved. Section 111.70(1)(d), Stats., defines collective bargaining as ". . . the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employees, to meet and confer at reasonable times, in good faith, with respect to wages, hours and conditions of employment with the intention of reaching an agreement, . . . the employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the employees . . ." (emphasis added).

When interpreting Sec. 111.70(1)(d), Stats., the Wisconsin Supreme Court has concluded that collective bargaining is required with regard to matters "primarily," "fundamentally," "basically" or "essentially" related to wages, hours or conditions of employment. The Court also concluded that the statute required bargaining as to the impact of the "establishment of educational policy" affecting the "wages, hours and conditions of employment." The Court found that bargaining is not required with regard to "educational policy and school mangement and operation" or the " 'management and direction' of the school system." Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976), Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89 (1977) and City of Brookfield v. WERC, 87 Wis. 2d 819 (1979).

During the hearing on the instant petition, the parties successfully resolved a portion of their dispute. The proposals set forth in Finding of Fact 5 reflect the modifications made by the Association during the hearing and, as to the Article VII(A)(6) preparation time proposal, after the hearing was concluded. The District addressed these modified proposals in its post-hearing argument and did not request additional hearing based upon said modifications.

(1) The disputed language is as follows:

ARTICLE III - ASSOCIATION RIGHTS

A. The Association and its representatives shall have the right to use school buildings for organizational meetings and activities related to the Association's responsibilities and functions as the exclusive collective bargaining representative, at reasonable hours and locations. The Association shall make prior arrangements for the use of school buildings with the Administration.

. . .

C. The Association and its representatives shall not be denied access to school property for the purpose of engaging in organizational activities related to the Association's responsibilities and functions as the exclusive collective bargaining representative, provided that such access and activities do not interfere with school functions or activities. Association representatives who are not employes of the District shall notify the Administration of their presence and purpose in any school building.

D. Employes who are Association representatives shall be permitted to use school facilities and equipment (including typewriters, mimeographing machines and other duplication equipment) for organizational purposes related to the Association's responsibilities and functions as the exclusive collective bargaining representative, at reasonable times and with

prior notice to the Administration, provided such equipment is not otherwise in use and that the Association shall pay for the cost of all materials and supplies incident to such use and repair of any equipment which may be damaged.

E. The Association shall have the right to post notices of activities and matters of Association concern on teacher bulletin boards. Subject to all applicable rules and regulations of the U.S. Postal Service, the Association shall have the right to communicate with bargaining unit members regarding matters related to the Association's responsibiltities and functions as the exclusive collective bargaining representative, through use of the District mail service and teacher mail boxes.

. . .

G. The District shall make a reasonable amount of time (not to exceed 30 minutes) available to the Association during the District's orientation program for new employes to describe and explain Association activities and services.

. . .

I. Each school year, the Association shall be provided with three (3) days of paid released time to be used by employes of the District who are officers or representatives of the Association for the transaction of Association activities related to the Association's responsibilities and functions as the exclusive collective bargaining representative. The use of such paid released time shall be at the discretion of the Association, provided that the Association gives the Administration at least twenty-four (24) hours advance notice of the intended use of such paid released time and that the use of such paid released time by Association representatives or officers does not unreasonably interfere with normal school functions. The Association shall assume the cost of substitute teachers, employed by the District to replace employes utilizing the paid released time authorized herein.

. . .

As to sections (A), (C), (D), and (E), the District argues that said sections all essentially require that the District grant the Association the right to use District property. The District draws the Commission's attention to Sec. 120.12, Stats., which provides that ". . . school board of common or union high school districts shall: (1) . . . have the possession, care, control and management of the property and affairs of the school district . . ." (emphasis added). The District contends that the use of the word "shall" in the introductory clause establishes that the 16 subsections which follow are mandatory rights or duties which the District must exercise. It asserts that only two of these subsections require the District to allow the use of District property for purposes other than the instruction of students: (1) Sec. 120.12(9), Stats., relating to the discussion of public questions if one-half of the school district's electors make a written application for such use, and (2) Sec. 120.12(10), Stats., relating to use school buildings for the discussion of public questions or the promotion of public health, by community citizen associations which are nonpartisan, nonsectarian and nonexclusive. Even in these circumstances, the District argues that it has complete statutory discretion to deny the use of District property if the use might interfere with the prime purpose of the school buildings or ground, i.e., regular school activities. The District asserts that as the uses of District property required by the Association's proposed clauses do not fall within the uses which the District must allow under the terms of Sec. 120.12, Stats., it may not be required to allow the Association to use its property.

The District also notes that Sec. 120.12, Stats., sets up a general rule establishing complete District control over its property. Exceptions are then listed and the District argues that the absence of additional exceptions to the general rule, such as those uses proposed by the Association, support a conclusion that the Legislature did not intend such use to be an option. The District

finally notes that the provisions of Sec. 120.12(15), Stats., specifically provide for the harmonization of the duty to bargain under the Municipal Employment Relations Act and Chapter 120 by specifying that the subject referenced in Sec. 120.12(15), Stats., (the establishment of normal school day) "shall not be construed to eliminate a school district's duty to bargain with the employes' collective bargaining representative." The District asserts that if the Legislature had intended to require it to bargain with the Association over the use of District property, it could have done so with a simple statement to that effect. As the statement is not contained in the law, the District contends that the Legislature must be presumed to have intended that the District may not be required to bargain over use of District property. Since the Legislature has reserved the right to control District property to the District, the District asserts that the Association's proposals relate primarily to the management or public policy function of the District and therefore are permissive rather than mandatory subjects of bargaining.

The District, in response to Association arguments, contends that the case of National Education Association - Topeka, Inc. v. U.S.D. 501, Shawnee County, 225 Kan. 445 (1979) does not support the Association's contentions that the proposals are mandatory subjects of bargaining. It argues that differences in statutory law and applicable duty to bargain standards render the case unpersuasive. The District also contends that the Commission's decision in City of Sheboygan, 19421 (3/82) does not provide the Association with substantial support. The District argues that in Sheboygan the mandatory proposal dealt with the union's right to install and maintain its own bulletin boards while the proposed clause in dispute herein provides the Association with the right to use existing bulletin boards which are District property and therefore governed by Sec. 120.12, Stats. The District thus contends that the rationale underlying the decision in City of Sheboygan, supra, is not broad enough to govern the Association's current proposals. As to the private sector cases cited by the Association in support of its arguments, the District contends that while it may be true that the proposals would be mandatory subjects of bargaining for a private sector employer under the terms of the National Labor Relations Act, it hardly follows that the clauses are mandatory under the Municipal Employment Relations Act. The District argues that the rights and remedies provided by these two statutes are not identical, that the Municipal Employment Relations Act requires the employer to abide by the results of an interest arbitration, and that none of the private sector cases involve the specific statutory grant of authority to manage property which is at issue in this case. Therefore, the District contends that the Association's arguments to the contrary should be rejected.

As to section (G), the District argues that the clause, as written, is susceptible to an interpretation that would require the District to provide an orientation program for new employes. Contending that such a decision is a permissive subject of bargaining, the District argues that the clause must therefore be found to be permissive. The District alleges that the Association's efforts to disavow the intention of requiring an orientation program cannot be allowed to make the proposal mandatory. It contends that if the Association intended to draft a proposal which recognized the right of the District to determine whether to hold an orientation program for new employes, it could have done so and argues that the Commission has previously held that "if a proposal is ambiguous and may be construed to primarily relate to the formulation or management of public policy, it will be found to be permissive even if the proponent of the proposal asserts that no such permissive interpretation was intended." Nicolet High School District, 19386 (2/82).

As to section (I), the District contends that the proposal does not primarily relate to wages, hours and conditions of employment. The District argues that the Association's citation of City of Madison, 16590 (10/78) in support of a contrary assertion is unpersuasive. It contends that the Commission's rationale in City of Madison was based in large measure on Sec. 111.70(3)(a)2, Stats., which provides in relevant part "the employer shall not be prohibited from reimbursing its employes at their prevailing wage rate for the time spent conferring with employees, officers or agents." As the clause in question does not limit the use of release time to time spent conferring with the District, the District argues that the City of Madison rationale, to the extent it was based upon Sec. 111.70(3)(a)2, Stats., is not broad enough to cover the Association's proposal herein. To the extent that the City of Madison decision reflects the Commission's concern with "peaceful resolution of disputes," the District argues that the Association's proposal does not assert or guarantee that the release time would be

spent furthering such a goal. Indeed, given the "at the discretion of the Association" language contained therein, the District notes the release time may be used for any purpose at all. The District also notes that while the expenditures required by the clause in City of Madison, may have been for a "public purpose," the expenditures required by the proposal in this case are not. The District therefore requests that the proposal be found to be a permissive subject of bargaining.

The Association contends that the District's reliance upon the provisions of Sec. 120.12, Stats., should be found to be unpersuasive. It notes that in City of Beloit, 11831-C (9/74) the Commission was confronted with a general argument that, as a matter of statutory construction, specific school statutes prevail over the provisions of the Municipal Employment Relations Act in those instances where they both cannot be given effect. The Association points out that in Beloit, the Commission responded as follows:

> It is apparent from the plain reading of Sec. 111.70(1)(d) that the Commission must attempt to harmonize the existing school statutes and the provisions of MERA, and also to recognize that certain matters are reserved to management. However, Sec. 111.70(1)(d) sets forth the obligation of municipal employers, and in this matter, school districts and their agents, to negotiate with their employes on wages, hours and conditions of employment, and further that municipal employers in exercising their powers and responsibilities must do so "subject to those rights secured to public employes . . . by this subchapter."
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> To accept the School Board's argument that all the duties and responsibilities delegated to, and required of, school districts and their agents are not subject to mandatory collective bargaining, would emasculate the provisions of MERA as applied to employes of a school district, rather than harmonize MERA with the school statutes.

The Association argues that the Commission should, as it did in Beloit, supra, conclude that Sec. 120.12, Stats., can be harmonized with the District's duty to bargain herein and thus that that specific statute does not render the Association's proposals permissive.

As to sections (A) and (C), the Association notes that it is proposing that it have the right to use school buildings and equipment for organizational meetings and activities. It contends that use of school property for meetings by community groups and teacher associations is a widespread and long-standing practice in Wisconsin. The Association argues that its right to use District buildings for its meetings is essential to the Association's ability to effectively perform its obligations as exclusive representative of all of the District's teachers. It asserts that union locals, especially small locals like the Association, cannot afford to own their own local building or to rent commercial facilities without substantially reducing the economic resources available for the purpose of funding negotiations and contract administration. It further argues that since the membership dues and fair-share contributions which pay for the Association's representational functions derive from employe wages, free use of the District's public buildings directly increases the employe's retained earnings.

The Association asserts that sections (C) and (E) of its proposal provide a contractual guarantee of the Association's statutory right of access to, and communication with, bargaining unit members at their work sites. It argues that these carefully defined and qualified rights are inextricably related to the Association's ability to effectively carry out its representational responsibilities and duties, and to the employes' practical and meaningful exercise of their rights under Sec. 111.70(2), Stats. As the rights set forth in these proposals are expressly and primarily related to the Association's "authority and responsibility as the exclusive bargaining representative," they should be found to be mandatory subjects of bargaining under the Commission's rationale in City of Sheboygan, supra.

The Association contends that the proposals have no relationship to or adverse impact on the District's formulation or implementation of educational policy. It argues that the proposed right to use school buildings, equipment and communications facilities, and the right of access to school property for the purposes of engaging in organizational activities, are properly and adequately qualified so as not to unreasonably or impermissibly restrict or interfere with the District's legitimate managerial interest. Thus, it notes that the Association's exercise of the proposed rights is, in each case, limited to reasonable times and locations and subject to the requirements of advanced notification to and prior arrangements with the District's agents. It also notes that the proposals are drafted so as to eliminate any interference or conflict with school functions or activities. It asserts that the express qualifications and limitations contained in the proposals prevent any kind of interference with or disruption of normal educational operations recognized by the courts as one of the few legitimate bases for restrictions on employes' associational rights. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). The Association argues that the proposals therefore do not conflict with the District's right to deny the use of its property where such use would interfere with regular school activities and school functions. The Association argues that where the District makes its buildings and property available to other community groups, the District cannot assert any legitimate interest in denying the Association access to its property for the purpose of fulfilling representational obligations and supporting the employes' exercise of their statutory rights. The Association believes a reasonable balancing of the impact of the proposals on the District's legitimate interests and managerial functions and on the Association's ability to effectively carry out its representational responsibilities requires the conclusion that the proposals are primarily related to the meaningful functioning of the Association--and thereby necessarily, to the employes' wages, hours and conditions of employment.

The Association contends that NEA -Topkea v. U.S.D. 501, supra, supports its assertions that the proposals should be found mandatory. It argues that the District's attempts to render that decision inapplicable herein are not persuasive. Similarly, the Association argues that the District's attempts to distinguish the sound duty to bargain principles set forth in NLRB v. Proof Co., 242 F 2d 560 (7th Cir. 1957) should be rejected.

As to section (G), the Association contends that its proposal cannot be reasonably interpreted to require orientation, noting that it expressly disavowed any such intention at the hearing in this case. Thus it contends that the Commission should reject the District's argument to the contrary. The Association urges the Commission to construe the proposal as requiring only that the District provide the Association with no more than thirty minutes, during any orientation program for new employes which the District chooses to conduct, for the purposes of introducing those employes to Association activities and services. The Association argues that the purposes of this proposal are not unlike those underlying the union bulletin board proposal at issue in City of Sheboygan, supra. It argues that the time made available pursuant to the Association's proposal would be used to explain and describe Association activities and services, to identify Association building representatives, officers and staff, and to explain aspects of the collective bargaining agreement. As a result, the Association contends that its proposal is primarily related to the effective performance by the Association of its representational duties and responsibilities and to the meaningful exercise of statutory and contractual rights by bargaining unit members. The Association also argues that, by analogy, the proposal is not unlike a provision regarding the orientation of new teachers to evaluative procedures, which the Commission has found to be a mandatory subject of bargaining. The Association therefore submits that this portion of its proposal is mandatory.

As to section (I), the Association asserts that the number of "union leave days" proposed is extemely limited; the economic impact on the District is minimal, since the Association assumes the cost of substitute teachers employed by the District to replace employes utilizing the paid release time; and the operation of the proposal is carefully qualified so as to preclude any undue interference with District managerial decisions or the conduct of its educational programs. As the proposal is primarily related to facilitating the Association's performance of its representational functions, the Association contends that it is a mandatory subject of bargaining. The Association notes that in City of Madison, supra, the Commission found the payment of wages for the time employe

representatives of the union spend in negotiations, grievance processing and other union representational functions to be a mandatory subject of bargaining. The Association argues that its proposal cannot be meaningfully distinguished from the provisions before the Commission in City of Madison, supra, or those at issue in Axelson, Inc., 234 NLRB No. 49 (1978); and American Shipbuilding Co., 226 NLRB 788 (1976). The Association also notes that, as the City of Madison decision suggests, the Association proposal is conceptually analogous to paid leave provisions, vacation or holiday pay provisions, educational convention provisions, and educational release time provisions, all of which are mandatory subjects of bargaining. It therefore asserts that the Commission should find this portion of its proposal to be a mandatory subject of bargaining.

Discussion of Proposal (1)

Our analysis of sections (A), (C), (D), and (E) of Association proposal (1) begins with the recognition that school districts are statutorily obligated to have "the possession, care, control and management of the property and affairs of the school district, . . ." Secs. 120.12 and 120.75, Stats. However, we do not accept the District's argument that this statutory obligation automatically removes the question of the use of school property by the Association from the realm of collective bargaining. As the Court noted in Fortney v. School District of West Salem, 108 Wis. 2d 167, (1982) ". . . while school boards are vested by statute with the primary responsibility for school district management, see chs. 118 and 120, Stats. 1977, they also have the power, pursuant to sec. 111.70, Stats., to limit their statutory powers by means of a collective bargaining agreement entered into with a Union composed of their employees." In our view, Fortney establishes that the Association can seek to limit the degree of control which the District has over its facilities so long as such a proposal is primarily related to wages, hours and conditions of employment as opposed to the management of District facilities or educational policy determinations. We would further emphasize that a determination that the Association's proposal is mandatory only gives the Association the opportunity to seek to place such a proposal in the parties' collective bargaining agreement. We turn now to a consideration of the Association's proposal to determine its mandatory or permissive status.

In School District of Janesville, 21466 (3/84), the Commission ruled upon the mandatory or permissive status of the following proposal:

> Teacher/Association Rights
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> Section 1. The Association and its representatives shall have the right to use school buildings for organizational meetings and activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative, at reasonable hours and locations, provided that such use does not interfere with school functions or activities or previously scheduled community activities. The Association shall make prior arrangements for the use of school buildings with the Administration. Such use of school buildings on regular school days, during the hours that a custodial staff employe is on regular duty, shall be without cost to the Association. When the Association uses school buildings at other times, the Association shall reimburse the District for its custodial costs incurred as a result of such use.
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> Section 2. The Association and its representatives shall not be denied access to school property for the purpose of engaging in organizational activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative, provided that such access and activities do not interfere with school functions or activities or previously scheduled community activities. Association representatives who are not employes of the District shall notify the Administration of their presence and purpose in any school building.

Section 3. The Association shall have the right to post notices of activities and matters of Association concern on teacher bulletin boards. Subject to all applicable rules and regulations of the U.S. Postal Service, the Association shall have the right to communicate with bargaining unit members regarding matters related to the Association's responsibilities and functions as the exclusive collective bargaining representative, through use of the District mail service and teacher mail boxes.

Section 4. Each school year, the Association shall be provided with ten (10) days of paid released time to be used by employes of the District who are officers or representatives of the Association for the transaction of Association activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative. The use of such paid released time shall be at the discretion of the Association, provided that the Association gives the Administration at least twenty-four (24) hours advance notice of the intended use of such paid released time and that the use of such paid released time by Association representatives or officers does not unreasonably interfere with normal school functions. The Association shall assume the cost of substitute teachers, employed by the District to replace employes utilizing the paid released time authorized herein.

The Commission ruled as follows:

Looking first at Section 1 of the Association's proposal, we concur with the Association's assertion that the right to use school buildings for "organizational meetings and activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative" does relate to employe wages, hours and conditions of employment. While we do not agree that the right to use buildings for meetings is "essential" to the Association's ability to effectively perform its obligations as the exclusive representative of all of the District's teachers, we do conclude that use of such buildings does facilitate the Association's ability to communicate with the employes it represents regarding collective bargaining and contract administration matters and thus assists the Association in meeting its statutory obligations to represent employes as to matters concerning wages, hours and conditions of employment. As will be discussed in greater detail later, the Commission has found that proposals which primarily relate to a union's "authority and responsibility as the exclusive collective bargaining representative" have been found to be primarily related to wages, hours and conditions of employment absent a showing of substantial relationship to the management of the employer's facilities. City of Sheboygan, supra.

When determining whether the above noted relationship to employe wages, hours and conditions of employment predominates over a relationship to management prerogatives and control of facilities, we are confronted with District assertions that Section 1 of the proposal would permit the Association to usurp prime building space and times to the exclusion of other persons or groups for purposes such as political rallies and speakers. The District has also asserted that the proposal does not protect District concerns for public safety. Finally the District cites the Commission's decision in Milwaukee Board of School Directors, supra, pp. 47-48 for the proposition that the Commission has already determined that the use of school buildings for "union" meetings is not a mandatory subject of bargaining.

As to the District's contention that the Association's proposal allows the Association to usurp prime building space and times to the exclusion of other community groups, we note that the Association's proposal specifies that the right of use is limited to "reasonable hours and locations, . . . that . . . does not interfere with school functions or activities or previously scheduled community activities." The proposal also requires that the Association make prior arrangements for the use of school buildings. Given these limitations upon the right of use, the proposal cannot in our judgment be reasonably interpreted as interfering in any meaningful sense with school functions or activities or the availability of the school building for other community activities. Furthermore, as the purpose for the "use" is limited to "activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative," we do not concur with the District's concern that the proposal would allow the Association to conduct political rallies or to have meetings at which "politically provocative" speakers held forth. We also have no basis in this record for concluding that Association use of building facilities will jeopardize public safety to an extent that is any greater than the jeopardy which may be caused by use of such facilities by other organizations. In this regard we note that the existing District policy does not require that all organizations which utilize District facilities acquire additional insurance above and beyond that which the District is statutorily obligated to possess. Thus, although it is clear that any use of District facilities by non-school organizations interferes in a general sense with the District's management and control of its facilities, we do not find this interference to be significant because use by the Association under this proposal can not interfere with school activities or with the ability of community organizations who have expressed an interest in using district facilities to utilize same. As to our decision in Milwaukee Board of School Directors, supra, the Commission was confronted with contractual language which specified: "Facilities shall be provided for teachers in each unit to meet". The Commission held:

> "The Board asserts that the proposals requirement that it provide facilities for teachers to meet, relates to the Board's ability to manage and control its physical facilities and thus is a permissive subject of bargaining. Blackhawk VTAE, supra. The provision as worded does not characterize the purpose of the teacher meetings and therefore might encompass meetings not required by the Board, such as meetings to discuss internal MTEA matters. Therefore, we deem the provision to be permissive. If the provision were worded to apply only to meetings required by the Administration, the provision would be mandatory."

The Commission's holding in that case was in response to a proposal which contained no limitation upon the purpose for which a meeting might be held and no safeguards against interference with school functions. While we continue to conclude that a proposal such as that which confronted the Commission in Milwaukee would be permissive due to the lack of any demonstrable relationship to either meetings required by the employer or meetings which are directly related to the Union's responsibilities and functions as the exclusive bargaining representative which do not interfere with the school functions or activities, we are not confronted with such a proposal herein. As we have previously discussed, the activities for which school buildings may be utilized are limited to those which facilitate the Association's performance of its statutory responsibilities in circumstances which do not

interfere with the educational process. Thus, we do not find our decision in Milwaukee to be a basis for concluding that the instant proposal is permissive.

In summary, we are confronted with a proposal which has a significant relationship to the Association's ability to meet its statutory obligations as the exclusive collective bargaining representative of employes and which has no significant detrimental impact upon educational policy or the District's ability to manage and control its facilities. Therefore, we conclude that this proposal is a mandatory subject of bargaining.

Related to the right to use school facilities for organizational meetings and activities is the Association's Section 2 proposal giving the Association and its representatives access to school property "for the purpose of engaging in organizational activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative". As with the issue of the right to use facilities, we conclude that the right of access to school property and thus to the employes does facilitate the performance of the Association's statutory obligations to collectively bargain on behalf of the employes as to their wages, hours and conditions of employment and to administer any contract so bargained. The right of access will also make meaningful the right to Association representation which we will in part find to be a mandatory subject of bargaining later in this decision. The District contends that the right of access proposal exposes the District to having unidentified persons on the premises and thus interferes with the orderly management of the District's facilities. We do not agree that the proposal can be reasonably so interpreted. The proposal specifies that non-employe representatives shall notify the District of their presence and the purpose for such presence. We conclude that such notification under this proposal will occur prior to the employe contact and thus will not expose the District to situations in which unidentified persons are on the premises. A contrary conclusion would run afoul of the language in the proposal which also specifies that the access and activities will not interfere with school functions or activities inasmuch as after the fact notification could likely lead to such interference. As the right to access is carefully limited and as the right to access cannot interfere with school functions or activities or previously scheduled community activities, we conclude that the relationship of this proposal to employe wages, hours and conditions of employment predominates over any interference with management control over its facilities or with the educational process.

Turning to Section 3 of the Association's proposal, which deals with the right to post notices on teacher bulletin boards and the right to communicate with bargaining unit members through the District's mail service, we commence our analysis by noting that in City of Sheboygan, supra, the Commission concluded that a proposal which gave a union the right to install and maintain bulletin boards in fire stations was a mandatory subject of bargaining. The Commission reasoned:

> We are not persuaded by the City's argument that the installation of a union bulletin board relates to the City's management of its facilities, or in any other way primarily relates to the management and operation of the City's firefighting facilities and capabilities. Such a bulletin board would be utilized for posting items such as notices relating to departmental job openings, union meetings and grievance meetings with management personnel pursuant to contractual grievance procedure, all of

> which relate to wages, hours and working conditions. Thus, we conclude that such a bulletin board proposal primarily relates to Local 483's authority and responsibility as the exclusive collective bargaining representative of the non-supervisory firefighters in the employ of City and relates to a mandatory subject of bargaining.

This decision recognizes the impact which effective communication between the exclusive collective bargaining representative and the represented employes has upon the bargaining representative's ability to meet its statutory responsibilities to represent the employes' interests in matters concerning employe wages, hours and conditions of employment. When balancing this abovenoted relationship to wages, hours and conditions of employment against any interference with the District's ability to manage its facilities, we are confronted with the District's contentions that the Association's bulletin board proposal would require the District to provide the boards and would further allow the Association to post matters of "concern" which may have no relationship to "collective bargaining and contract administration". The District has also asserted that the mail service proposal requires compliance with the United States postal service regulations and thereby usurps District control over the facilities and exposes the District to potential expenses related thereto.

Looking first at the bulletin board portion of this proposal, the Commission concludes that the District is correct when it argues that the potential use to which the bulletin board might be placed is broader in scope than matters which relate to collective bargaining and contract administration. Unlike the mail service proposal also contained in Section 3, the right to post notices is not limited to "matters related to the Association's responsibilities and functions as exclusive collective bargaining representative." If the bulletin board proposal were so limited, we would conclude that its provisions which allow use of existing bulletin boards would be a mandatory subject of bargaining under the rationale expressed in City of Sheboygan, supra, because the relationship to effective collective bargaining and thus to employe wages, hours and conditions of employment would predominate over the minimal intrusion into control over facilities. However, as the right to post notices expressed in this proposal is overbroad and allows the posting of matters which have no substantial relationship to the Association's responsibilities and functions as exclusive collective bargaining representative, we find this portion of the proposal to be permissive.

As to the proposal's specification of a right to the use of District mail service and teacher mail boxes, we concur with the Association that the reference to the United States Postal Service can most reasonably be interpreted as an assurance to the District that the Association's right of use will be subject to any applicable rules and regulations. Thus, we reject the District's argument that the proposal imposes some District duty to abide by applicable rules and regulations which may create additional burdens or expenses for the District. As the right to use of mail services is limited to "matters related to the Association's responsibilities and functions as the exclusive collective bargaining representative", and as the District has not presented any persuasive argument as to how this use will interfere in any significant way with its management of District facilities, we conclude that this portion of the proposal is a mandatory subject of bargaining because the above discussed relationship to communication which enhances bargaining over employe wages, hours and conditions of employment predominates.

Our conclusion is in accord with that of the Commission in Milwaukee Board of School Directors, 9258-A (11/74) wherein the following proposal was found to be an appropriate subject for collective bargaining:

> Allow the exclusive bargaining representative the right to post on bulletin boards and distribute through mailboxes materials pertaining only to functions of the exclusive bargaining representative, i.e., the status of negotiations, including positions of the parties as relating to wages, hours and working conditions and the status of grievances being processed through the negotiated grievance procedure. No other material on any other subject may be distributed by any labor organization if such policy is adopted. Furthermore, if the material to be distributed in the above manner by the exclusive bargaining representative should also contain information regarding subjects not pertaining to the functions of the exclusive bargaining representative, such as increased dues or an improved union insurance plan, such matter may not be posted on bulletin boards or distributed by the school mailboxes.

As to Section 4 of the Association's proposal, the Commission in City of Madison, supra, concluded that it was a mandatory subject of bargaining to propose that union stewards and employe witnesses would not lose pay for time spent in arbitration hearings which occurred during the employes' normal work periods. The Commission reasoned that such a proposal was mandatory because it furthered the process of peaceful resolution of disputes and did not impact in any significant sense upon employer prerogatives. While the proposal before us herein is broader in scope than that before the Commission in Madison, as it extends to "the transaction of Association activities directly related to the Association's responsibilities and functions as exclusive collective bargaining representative", we believe that the Association leave proposal nonetheless has a significant relationship to employe wages, hours and conditions of employment. In this regard we find persuasive the analysis of the National Labor Relations Board in Axelson, Inc., 234 NLRB No. 49, 97 LRRM 1234 (1978) wherein the Board was confronted with the question of whether the payment of wages lost by employe members of union bargaining committees during negotiations is a mandatory subject of bargaining. The Board held:

> The Administrative Law Judge found that the remuneration of 'employes for performing union functions goes more to the relationship between union and employer than to that between employe and employer,' and that, therefore, the payments in question did not involve mandatory subject of bargaining. The Administrative Law Judge was in error. Such a matter concerns the relations between an employer and its employees in that it is related to, the representation of the members of the bargaining unit in negotiations with an employer over terms and conditions of employment.
>
> We have previously found that the performance of similar union functions can vitally affect an employees relationship with his or her employer. For instance, under circumstances similar to the instant case, we have found that wages paid to employees during the presentation of grievances constitutes a mandatory subject of bargaining. . . . Similarly, we have found that the union related

functions such as super-seniority accorded to union representatives, union security, and check-off provisions are also mandatory subjects of bargaining. These union related matters inure to the benefit of all the members of the bargaining unit by contributing to more effective collective bargaining representation and thus 'vitally affect' the relations between an employer and employee.

We see no distinction between an employee's involvement in contract negotiations and involvement in the presentation of grievances. In one situation an employee is implementing a contractual term or condition of employment and the other situation an employee is attempting to obtain or improve contractual terms or conditions of employment. In both situations the activity is for the benefit of all of the members of the bargaining unit. Accordingly, we find that the payment of wages to employees negotiating a collective bargaining agreement 'constitutes an aspect of the relationship between the employer and employees' and is therefore a mandatory subject of bargaining. (footnotes omitted)

The Fifth Circuit Court of Appeals affirmed the Board's conclusion in Axelson, Inc. v. NLRB, 599 F.2d 91, 101 LRRM 3007 (1979) and concluded:

"It is clear from a perusal of these cases that the issues qualifying as mandatory subjects of bargaining are very diverse. However, a common theme seems to run throughout; the qualifying subjects benefit all of the members of the bargaining unit through encouraging the collective bargaining process and vitally affecting the relationship between the employer and employees.

The Board, in its decision, emphasized the similarity of the benefits inuring to the Union members in the instant case with those involved in the presentation of the grievances. It advances the theory that effectiveness of the collective bargaining process will be greatly diminished by permitting companies through unilateral action to discourage seasoned and well qualified union representatives from participating in collective bargaining. The Board argues that many highly skilled negotiators will be reluctant to continue to serve on the committee if they are required to negotiate only during off-time or lose their production pay. These arguments do not fall on deaf ears. We are not unaware of the reluctance a person might have to make such sacrifices. The similarity of employees attempt to improve contract terms or conditions of employment through collective bargaining with an employees' attempt to insure implementation of a contract term or condition does not go unnoticed.

Keeping in mind the necessary deference accorded the Board's statutory interpretation, we are persuaded that the Board's conclusion that the instant case involved a mandatory subject of bargaining is 'legally defensible and factually acceptable'." (footnote omitted)

The Association's proposal herein allows the use of the leave time for "the transaction of Association activities directly related to the Association's responsibilities and functions as the exclusive collective bargaining representative." Clearly the processing of grievances and bargaining of

contracts discussed persuasively in Axelson fall within the parameters of the above quoted term. While it is clear that other matters may well fall within the scope of the above quoted phrase, we are satisfied that, given the requirement that such activities be "directly related" to the Association's responsibilites and functions as the exclusive collective bargaining representative, such additional activities for which leave may be utilized are also related in a significant fashion to employe wages, hours and conditions of employment.

The District contends that the use of paid leave time under the proposal substantially interferes with the educational process and that this interference predominates over any relationship to employe wages, hours and conditions of employment. The interference to which the District refers focuses upon the negative impact which the absence of a teacher will cause. An examination of the Association's proposal indicates that the use of the release time has attached to it various safeguards designed to insure that any interfere with normal school functions is minimized. The Association is required to give the District at least twenty-four hours notice of intended use and, even when notice is provided, use of the leave cannot unreasonably interfere with normal school functions. The intrusion into educational activities caused by this proposal is no different than that which might be caused by a proposal seeking personal holidays or other types of leave for employes. While it is true that the absence of a regular teacher from a class may well cause some lessening of the quality of education received by the students on that day, we conclude that on balance, especially in light of the safeguards written into the proposal, the proposal is a mandatory subject of bargaining because of the relationship to employe wages, hours and conditions of employment predominates. The merits of the proposal, of course, are for the bargaining table and, if necessary, mediation-arbitration.

We would also note that we find unpersuasive the District's argument to the effect that such a clause may be illegally discriminatory against employes who are not "officers or representatives" of the Association. As we noted in City of Madison, supra, Sec. 111.70(3)(a)2 Stats. explicitly authorizes the payment of wages to employes "for the time spent conferring with the employes, officers or agents." Thus, we believe it is clear that the Legislature has concluded that the payment of wages to employes who are performing functions directly related to the collective bargaining process does not constitute illegal discrimination under the Municipal Employment Relations Act. We also note that the Gulton Electric case is limited to super-seniority and thus does not overturn the holding in Axelson which we have quoted earlier. Lastly we would point out that the decision of the Iowa Supreme Court in Charles City Community School District v. PERB, 275 N.W. 2d 766 (1979) cited by the District was premised upon specific statutory provisions which define the scope of bargaining as well as the rights of employers and which differ substantially from those in Wisconsin. We do not find that decision to be applicable or persuasive herein.

The proposals of the Association herein are similar to those which were ruled upon by the Commission in Janesville. Sections (A), (C), (D), (E), and (I), like the proposals in Janesville, provide the Association with certain rights which are related to the Association's ability to meet its responsibilities and to fulfill its function as the exclusive collective bargaining representative of the employes in the bargaining unit. As we noted in Janesville and reaffirm here, this relationship to the Association's responsibilities and functions also creates a direct relationship to employes' wages, hours and conditions of employment. In this regard, while the Association proposals in Janesville did not include a proposal such as that found in section (D) herein, relating to use of school

equipment (including typewriters, mimeographing machines and other duplication equipment), we see no meaningful distinction between the right to use school buildings for activities related to the Association's responsibilities and functions as the exclusive collective bargaining representative and the right to use specific pieces of school equipment located in those buildings for the same purposes. Having noted the relationship which the Association's proposals herein have to wages, hours and conditions of employment, we turn to a specific examination of said proposals to determine whether this relationship predominates over any relationship to the management of District facilities or educational policy determinations.

As to section (A) of the Association's proposal herein, we note that this proposal, unlike the proposal in Janesville, does not contain a proviso that "such use does not interfere with school functions or activities or previously scheduled community activities." Absent such a proviso, the Association's proposal can reasonably be interpreted as allowing Association use of school buildings which may, on occasion, interfere with school functions or activities. We conclude that the potential for such interference, when balanced against the relationship to wages, hours and conditions of employment, is significant enough to warrant a determination that the proposal, as written, does not primarily relate to wages, hours and conditions of employment. If such a proviso were added to this proposal, we would find that the proposal is a mandatory subject of bargaining as we did in Janesville. As we noted in Janesville, although it is clear that any use of District facilities by non-school organizations interferes in a general sense with the District's management and control of its facilities, we do not find this interference to be significant enough to overcome the relationship of the proposal to employe wages, hours and conditions of employment.

Turning to section (C), this proposal does contain a proviso stating "that such access and activities do not interfere with school functions." However, unlike the proposal before the Commission in Janesville, there is no mention of the guarantee that the Association rights provided in the proposal will not "interfere with . . . previously scheduled community activities." Absent this proviso, and the resultant potential for such interference with the statutorily established right of use for such groups, see Secs. 120.12(9) and (10), Stats., the Commission concludes that the proposal, as written, does not primarily relate to wages, hours and conditions of employment. If such a proviso were added to this proposal, we would find it to be a mandatory subject of bargaining for the reasons set forth in our Janesville decision which is quoted above.

As with section (A) of the proposal discussed above, section (D) of the Association's proposal must, as written, be found to be a permissive subject of bargaining because it lacks a proviso guaranteeing a lack of interference with school functions or activities or previously scheduled community activities. If such a proviso were added to this proposal, we would find it to be a mandatory subject of bargaining.

As to section (E) of the Association's proposal, which directly parallels the proposal ruled upon by the Commission in Janesville, we conclude, as we did in Janesville, that while the use of District mail service is properly limited to matters "related to the Association's responsibilities and functions as the exclusive collective bargaining representative," the bulletin board portion of the proposal is not properly so limited. Thus, we find the bulletin board portion of the proposal to be permissive because "matters of Association concern" would allow posting of materials which do not relate to collective bargaining and contract administration and the Association's functions as the exclusive collective bargaining representative. If the proposal herein were limited to "matters related to the Association's responsibilities and functions as the exclusive collective bargaining representative," we would find it to be a mandatory subject of bargaining for the reasons set forth in the Janesville decision quoted above.

Turning to section (G) of the Association's proposal, we concur with the District's contention that the proposal can most reasonably be interpreted as requiring that the District have an orientation program for new employes. As the Association concedes in its brief, the Commission has concluded that the decision as to whether to provide in-service training or orientation for new teachers is a permissive subject of bargaining. Milwaukee Board of School Directors, 17504 (12/79), 20093-A (2/83). Thus, we find that the proposal, as written, is a permissive subject of bargaining. If the proposal were redrafted to reflect an intent that the District's obligation only exists if the District determines to

have an orientation program for new employes, we would nonetheless find the proposal to be a permissive subject of bargaining. We initially note in this regard that the content of the program to be provided during in-service or orientation days has been found to be a permissive subject of bargaining. Beloit supra. We also note that the Association has other means by which to supply new employes with the explanation of Association activities and services and thus we find the relationship of this proposal to employe wages, hours and conditions of employment to be slight when compared to the potential interference with District educational policy determinations as to how to spend time set aside for orienting new employes.

Section (I) of the Association's proposal herein parallels a portion of the Association Rights proposal found mandatory by the Commission in Janesville. We find this proposal to be mandatory for the reasons set forth in our Janesville decision quoted above.

The disputed proposal is as follows:

(2) ARTICLE IV - TEACHER RIGHTS

> A. No teacher may be disciplined or discriminated against in regard to terms or conditions of employment by the District on the basis of the teacher's religious or political affiliations (or the lack thereof), or aspects of the teacher's personal lifestlye, where such affiliations and/or lifestyle are substantially unrelated to the teacher's adequate performance of his or her job duties and responsibilities.

The District asserts that this proposal is a permissive subject of bargaining. It contends that a governmental employer may establish conditions of employment including reasonable restrictions on the exercise of constitutional rights which the employe might otherwise enjoy. The District alleges that the establishment of these conditions is a question of public policy reserved to the employer. As the proposed clause attempts to limit the District's decision-making power in this area, the District contends that the proposal is primarily related to a permissive subject of bargaining.

Looking at the specifics of the proposal, the District asserts that the use of the phrase "or discriminated against" when used in conjunction with the phrase "political affiliations" makes the proposed clause a permissive subject of bargaining. The District alleges that many kinds of discrimination based on the political affiliations of public employes have been held to be proper. For instance, the District contends that a public employer may require its employes to take a loyalty oath as a condition of employment and discharge for failure to do so. Similarly, the District alleges that it has been widely held that governmental employers may forbid their employes from engaging in certain kinds of political activities, such as running for office or holding certain positions in political parties. Indeed, the District argues that it has been held that governmental employers may require that an employe choose between membership in a certain organization and employment in a school system. The District contends that as all these types of qualifications are ". . . substantially unrelated to the teachers' adequate performance of his/her job . . .," the decision as to whether to discriminate against or discipline employes on the basis of these qualifications is a question of public policy or school management which should be reserved at the discretion of the District.

The District also asserts that the proposed clause would prevent it from discriminating against teachers on the basis of aspects of the teacher's personal lifestyle which are substantially unrelated to the teacher's performance of job duties. The District argues that there are, however, aspects of a teacher's personal lifestyle which the District might properly choose as a qualification for continued employment. As an example, a district could conclude that, given the large social problem of alcohol abuse, a staff of non-drinking teachers would be an effective way of counteracting drinking among high school students. That district might require that all teachers in its employ be teetotalers. As there is no inherent right to consume alcohol, and as public employment is a privilege rather than a right, the District asserts that continued employment could be conditioned upon one's agreement to refrain from consuming alcohol. The District

asserts that the power to make such a decision is clearly reserved to the employer as a matter of public policy or school management. As the Association's proposed clause would prohibit such decisions, unduly impinging on the District's ability to manage the school, the District asserts that the proposal should be found to be a permissive subject of bargaining.

The District also asserts that although not every form of off duty misbehavior justifies discipline, aspects of a personal lifestyle which are substantially unrelated to job performance may nonetheless so adversely affect the employer as to justify discipline up to and including discharge. Broadly interpreted, the District believes that the proposed clause could cover a multitude of sins which clearly fall within the management right to discipline employes. Unlike a "just cause" clause, the proposed clause is not a limitation on the procedure to be employed in imposing discipline, but is in effect an absolute prohibition on disciplining an employe for activity taken outside the workplace. The District therefore asserts that the clause, as written, is permissive.

The District asserts that the Court's decision in Blackhawk Teacher's Federation v. WERC, 109 Wis. 2d 415 (Ct. App. 1982) wherein the Court found the following proposal to be mandatory:

> When the teacher speaks of rights as a citizen, he shall be free from administrative and school censorship and discipline. However, the teacher has the responsibility to clarify the fact that he speaks as an individual and not in behalf of the school.

does not require a contrary conclusion. It notes that in the Blackhawk proposal there was no reference to discrimination or to personal lifestyle and thus aspects of the Association's proposal herein cannot be seen as having been ruled upon. Furthermore, the District asserts that, as the Court noted in discussing the clause in which the Commission's decision was reversed, the ". . . primary focus is on the employe's right to be free from employer-imposed sanctions for the exercise of rights that may be constitutionally protected." To a great extent, the District asserts that the Association's proposal attempts to protect many types of behavior that do not enjoy constitutional protection (or may be constitutionally limited by a governmental employer), and thus that, to some extent, the proposed clause does not fall within the penumbra of protection provided by Blackhawk. The District concurs with Judge Gartzke who, in his Blackhawk dissent, stated: "Merely connecting a proposal with discipline cannot, of itself, make the proposal primarily related to employment conditions."

Contrary to the Association, the District asserts that it can claim a legitimate managerial interest in controlling at least the political activities of its employes. It notes that the Hatch Act prohibits a variety of political activity by state and local governmental employes. The District also cites Sec. 15.06(1)(d)4, Stats., which provides that no person appointed to be a member of the Wisconsin Personnel Commission, "when appointed or for three years immediately prior to the date of employment, may have been an officer of a committee in any political party, partisan political club or partisan political organization or have held or been a candidate for any partisan elective office." Thus the District argues that, like the state and federal governmental and courts, it, as a governmental employer, can surely assert a similar legitimate interest in limiting the political activity of its employes. The District also notes that the Association's arguments do not clearly state which First Amendment rights are referred to in its proposal. The District admits that there are undeniably some activities which are covered by the clause for which the District could not discipline or discriminate against an employe. However, the District argues that just as certainly there are many such activities for which the District could properly discipline or discriminate against an employe. The District asserts that the mere use of the phrase "substantially unrelated to the teacher's adequate performance of his or her job duties and responsibilities" in the proposed clause does not adequately draw the line between permissive discipline or discrimination based on public policy choices. The District asserts that the language of the proposed clause is broad enough to be interpreted to bar the District from exercising its management right to impose permissible limitations on its employes. The character of activities taken within the realm of "political affiliation" may be such as to be properly limited by the District even without showing that the activities were substantially related to the teacher's job

performance. Therefore, the District argues that the proposed clause unduly infringes upon the District's ability to make decisions regarding the formulation and management of public policy and is, as written, permissive.

The Association counters by asserting that its proposal is directed at protecting teacher's First Amendment rights with respect to political and religious affiliations and personal lifestyle and limits the District's ability to discipline or discriminate against teachers on the basis of the exercise of those rights. As such, the Association argues that the proposal is comparable to a contractual "just cause" clause and to the academic freedom provisions held to be a mandatory subject of bargaining by the Court in Blackhawk.

Although the Association does not concede the validity of the conclusions asserted by the District with respect to the District's ability to discriminate legally against teachers on the basis of their political affiliations or to discipline employes for their personal conduct away from the job, the Association contends that the District clearly overstates the scope of the proposal's coverage. The Association notes that the District's managerial authority to control its work force is restricted only to the extent of precluding discipline or discrimination based on a teacher's affiliations or lifestyle which are not substantively related to the adequate performance of the teacher's job duties and responsibilities. While admitting that the proposal is not unrelated to managerial decision-making, the Association asserts that its prohibition against discrimination or discipline based on criteria unrelated to the employes' work performance is not primarily related to the formulation of educational policy or the management of the school district. The Association asserts that the District can claim no legitimate managerial or educational policy interests in disciplining employes or discriminating against them with respect to their exercise of First Amendment rights referred to in the proposal.

The Association asserts that its proposal neither purports to limit nor would in fact limit the District's legitimate rights to impose upon employe conduct permissible restrictions which are substantively related to work performance or to the employes' positions as public school teachers. The Association asserts that its proposal does not preclude the District from prohibiting activity which is legally inconsistent with an employe's status as a teacher or from disciplining an employe for personal behavior which substantially impairs his/her ability to adequately perform the instructional role of a teacher.

The Association contends that it is well established that the government "may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." Abood v. Detroit Board of Education, 431 U.S. 209 (1977). Furthermore, the Association asserts that "inquiries into personal beliefs and associational choices come within this protection." Robinson v. Reed, 566 F. 2d 911 (5th Cir. 1978). The Association also cites the U.S. Supreme Court in Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969):

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate.
>
> . . .
>
> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained. . . .

Thus, while admitting that the courts have recognized a limited right on the part of the school district to impose restrictions on a teacher's exercise of First Amendment rights, the Association contends that such restrictions, to pass

constitutional muster, must necessarily be required to prevent a substantial or material interference with the requirements for appropriate discipline and the operation of the school or must have a rational connection with the teacher's fitness or capacity to perform her instructional duties and responsibilities.

The Association contends that its proposal provides contractual job security and protection against impermissible discipline or discrimination based on a teacher's exercise of First Amendment rights. It asserts that the proposal's explicit qualifications on the employment protections afforded by the proposal are consistent with and embody the narrow limitations on the exercise of those rights recognized as permissible by the courts. Accordingly, the Association alleges that the proposal does not unduly impinge on the District's legitimate educational policy or managerial rights and is primarily related to teacher job security and conditions of employment. As in Blackhawk, the Association contends that its proposal's "primary focus is on an employe's right to be free from employer-imposed sanctions for the exercise of rights that may be constitutionally protected." 109 Wis. 2d at 442. As the Court held in that case, employer-imposed discipline threatens job security and a contractual provision which seeks to protect teachers from disciplinary action or employment discrimination based on their exercise of First Amendment rights is primarily related to their conditions of employment. Thus, the Association requests that the Commission find its proposal to be a mandatory subject of bargaining.

Discussion of Proposal (2)

In Blackhawk, supra, the Court of Appeals found the following proposal to be a mandatory subject of bargaining:

> When the teacher speaks of rights as a citizen, he shall be free from administrative and school censorship and discipline. However, the teacher has the responsibility to clarify the fact that he speaks as an individual and not in behalf of the school.

The Court reasoned:

> Paragraph four contains three parts: First, that the teacher shall be free from school discipline when the teacher speaks or writes as a citizen; second, that the teacher shall be free from school censorship when engaging in such activity; third, that the teacher must clarify that he speaks on his own behalf. Although part three imposes a responsibility upon the teacher, it says nothing about the possibility of sanctions if the teacher does not comply, and it only peripherally relates to working conditions.
>
> The other parts, however, relate to a teacher's employment conditions, since they refer to sanctions that could be imposed on a teacher only because of the employment relationship. Although paragraph four does reflect concern for citizens' first amendment rights, its primary focus is on an employe's right to be free from employer-imposed sanctions for the exercise of rights that may be constitutionally protected. The possibility of discipline or censorship relates to a teacher's working conditions.
>
> The fact that paragraph four applies to a teacher's exercise of first amendment rights only as a citizen does not mean it is primarily unrelated to employment conditions. If a teacher speaks or writes as a citizen and is subsequently disciplined or censored by his employer for engaging in such activity, the result is as devastating as if the teacher had been disciplined for making certain statements in the classroom. Employer-imposed discipline threatens job security and is primarily related to a teacher's conditions of employment.
>
> The circuit court nevertheless concluded that paragraph four does not even relate to employe discipline because a teacher may choose to refrain from speaking or writing as a

citizen and thus avoid disciplinary action. If a teacher exercises constitutionally guaranteed rights in an atmosphere of fear that he may be disciplined or censored by his employer, there is still a negative effect on that teacher's conditions of employment. We therefore do not agree that disciplinary action is only meaningful when it is triggered by the violation of a duty.

We do concur with the Federation's assertion that the bargaining table is a proper forum to resolve disputes concerning the possibility of employer-imposed discipline or censorship for an employe's exercise of first amendment rights. The fact that the activity triggering the sanctions involves a theoretically difficult area of law is insufficient to remove such issues from the bargaining table. The availability of courts as alternative forums to resolve constitutional law disputes also does not preclude the resolution of the underlying issues at the bargaining table, since that forum is competent to determine issues involving potential employe sanctions. Further, the bargaining table is often faster and less expensive than court adjudication and therefore could prove to be a more efficient forum.

The Association has attempted to characterize its proposal as one which seeks to protect employes against constitutionally impermissible intrusions upon the exercise of First Amendment rights. If the proposal itself were so limited, the rationale of the Court in Blackhawk, supra, would render the proposal a mandatory subject of bargaining. However, the proposal before us does not use the term "First Amendment rights" or "constitutional rights." Instead, the proposal speaks broadly to "religious and political affiliations" and "personal lifestyle" when defining the employe activity or lack thereof covered by the proposal. Thus, while the scope of the Association's proposal undeniably extends to include employe First Amendment constitutional rights as to which the District could not constitutionally impose discipline upon or discriminate against an employe, the language of the proposal is also broad enough to extend into areas of employe activity which the District could constitutionally regulate. Thus, the District is correct when it argues that Blackhawk does not render the proposal herein a mandatory subject of bargaining. However, it should also be made clear that the proposal's coverage of activity which could constitutionally be regulated by the District does not automatically render the proposal a permissive subject of bargaining. While the District correctly notes that regulation of certain employe conduct covered by this proposal may implicate certain managerial or educational policy choices, our task herein is focused upon a determination of whether those managerial interests or policy choices impacted by this proposal outweigh the relationship of the proposal to employe wages, hours and conditions of employment. We turn to that task.

When applying the primary relationship test to this proposal, it is critical to note that the proposal's protections are limited to covering employe activity which is "substantially unrelated to the teacher's adequate performance of his or her job duties and responsibilities." Thus, the management prerogatives or educational policy choices infringed upon by this proposal are limited to those which are "substantially unrelated to the teacher's adequate performance of his or her job duties and responsibilities." The District remains free under this proposal to discipline or discriminate against an employe for conduct or activities which do relate to the teacher's adequate performance. Therefore, we find the scope and degree of intrusion represented by this proposal to be somewhat limited. On the other hand, the employe interests reflected by this proposal are substantial. As the Court noted in Blackhawk, employe interests in being protected against discipline extend ultimately to concerns about job security and thus have a direct impact upon employe conditions of employment. Given this substantial relationship to employe conditions of employment and the minimal intrusion upon District prerogatives, we find this proposal to be a mandatory subject of bargaining.

(3) The disputed proposal is as follows:

ARTICLE VII - COMPENSATION

A.

. . .

6. Teachers to whom the District does not provide nine and one-third (9 1/3) hours of preparation time per week, during the regular teacher workday, shall receive compensation, in addition to their scheduled salaries, in the amount of one-fourth (1/4) of the teacher's regular hourly pay for each such quarter hour (or major fraction thereof) less than nine and one-third (9 1/3) hours per week provided by the District.

As used herein, preparation time provided by the District may include that amount of time during the regular teacher workday which occurs before and after the hours of the student school day during which teachers do not have other assigned duties.

As used herein, a teacher's regular hourly pay shall be determined by dividing the teacher's yearly (base) salary by the product of 180 (instructional days per year) x 8 (hours per workday).

For teachers with less than full-time contracts with the District, the amounts of preparation time and additional compensation provided for in this subsection shall be prorated according to the percentage of a full-time contract held by such teachers.

Any additional compensation earned by a teacher under this subsection shall be separately itemized and paid monthly by the District.

. . .

The District contends that the clause, as written, is simply too ambiguous to determine whether it is mandatory or permissive. The District asserts that the major difficulty in this regard is the lack of any reasonable comprehensive definition of the phrase "preparation time." Although the District notes that the second paragraph of the proposal does provide that the time before and after the student school day may be included in this computation, it argues that such time would only amount to about one-half of the preparation time required by the proposal. The District alleges that it is unsure of what other types of time may be included or, more importantly, what types of time may not be included in preparation time calculations. The District argues that the type of time affected by this proposal must be known before the clause can be assessed as to its relationship to wages, hours and conditions of employment or to educational policy determinations. When a proposed clause is written so that the Commission cannot determine on its face whether it is a mandatory subject of bargaining, the District contends that the clause should be found to be permissive. At the very least, the District contends that the Commission should not express an opinion as to whether such a proposal is mandatory or permissive pending further clarification of the clause. In this regard the District notes the Court's holding in Blackhawk, supra, to the effect that "there is nothing in the legislative history of Sec. 111.70(1)(d) to support a presumption that ambiguous bargaining proposals must be construed as mandatorily bargainable."

The District also argues that the proposal may be sufficiently similar to the student-contact proposals found permissive in Blackhawk, supra, and Oak Creek-Franklin Joint City School District No. 1, 11827-D, E (9/74) to warrant a finding that the proposal is permissive thereunder.

The Association counters by asserting that its proposal is sufficiently unambiguous, with respect to both its terms and its operation, that a reasonable interpretation of the proposal can be easily reached by the Commission. Contrary to the District's claimed inability to understand the term, the Association contends that "preparation time" is a commonly defined and generally understood term of labor relations in the school context. The Association asserts that preparation time is that time which is available to teachers during their regular working day for use in preparing instructional presentations and materials, evaluating student work, and generally preparing for classroom assignments, during which the teacher is not required to supervise or instruct students and has no other assigned duties inconsistent with the classroom preparation. In addition, the Association argues that the definitional language of the second paragraph of the proposal supplements the common definition of "preparation time" (i.e., "during which teachers do not have other assigned duties") and clarifies that the preparation time addressed by the proposal need not consist entirely of specific periods of the school day being set aside for teacher preparation. The Association asserts that the language of the second paragraph clearly indicates that the unassigned time during the regular teacher workday, both before and after the hours of the student day, may be calculated as preparation time provided by the District. The Association contends that this language eliminates the only possible ambiguity in the proposal, since the amount of time during the school day when a teacher is not required to instruct or supervise students or perform other assigned duties inconsistent with classroom preparation is readily determinable and clearly included within the term "preparation time." Moreover, the Association argues that while no definition of "preparation time" was included in the contact hours proposal at issue in the Oak Creek declaratory ruling case, the Commission was still able to rule on the Association's proposal that "(teachers) shall be guaranteed two preparation periods per day." Similarly, in this case, the Association is entitled to have the Commission recognize and apply the common definition of "preparation time" to its interpretation and ruling with respect to the Association's proposal.

The Association asserts that its proposal is clearly distinguishable from provisions held to constitute permissive subjects of bargaining by the Commission in its Oak Creek and Blackhawk decisions. Unlike the provision at issue in Blackhawk, the Association argues that its proposal does not dictate the amount of student contact time. Furthermore, unlike the clause in dispute in Oak Creek, the Association asserts that its proposal does not mandate the number of preparation periods or amount of preparation time which teachers must be provided by the District. The Association points out that its proposal does not require the District to provide teachers with any specific amount of preparation time during the regular teacher workday. The Association contends that its proposal requires only that additional compensation be paid to teachers who are not provided 9 1/3 hours of preparation time per week. The Association notes that in the Commission's Oak Creek decision, the Commission acknowledged the undisputed fact that teachers are expected to, and must prepare for their classroom teaching assignments. Additional money is intended, in the Association's view, to compensate for the time outside the regular workday which teachers will have to devote to preparation, in the event that the District does not provide such preparation during the regular workday. As such, the Association alleges that the proposal does not primarily relate to matters of educational policy or to the allocation of teacher work assignments during the workday, but rather to the impact on employe wages, hours and conditions of employment of particular District work assignment decisions.

The Association asserts that its proposal is conceptually parallel to the

In School District of Janesville, supra, the Commission found the following preparation time proposal to be a mandatory subject of bargaining.

> Section 3. Elementary School Grades Pre-K-6).
>
> a. Elementary school teachers (grades Pre-K - 6) to whom the District does not provide five (5) hours of preparation time per week during the student school day shall receive compensation, in addition to their scheduled salaries, at the teacher's regular hourly rate of pay for each such hour less than five (5) per week provided by the District.
>
> b. As used herein, preparation time provided by the District shall not include any unassigned time after the regular teacher workday begins but before the student school day begins, or after the student school day ends but before the regular teacher workday ends.

The Commission reasoned:

> In Oak Creek, supra, the Commission was confronted with the question of whether the following proposal was a mandatory subject of bargaining:
>
> > This 25 contact hours may be averaged out over the entire school year. In the 1972-73 school year, no teacher in the Senior High School shall be obligated to teach more than five classes each semester. No 7-12 school teacher shall be required to teach more than three different preparations or ability levels. If a teacher agrees to more than three different preparations, said teacher shall be freed from all other supervisory duties such as study hall, lunchrooms, etc. They shall be guaranteed 2 preparation periods per day. If the teacher wishes, he or she may agree to take other supervisory duties as study hall." (emphasis added)
>
> When finding the proposal to be a permissive rather than a mandatory subject, the Commission commented:
>
> > We conclude that the Association's proposal with regard to teacher-pupil contact hours, and the number of preparations that may be required of a teacher concern matters of educational policy, and therefore are permissive and not mandatory subjects of bargaining. Such decisions directly articulate the District's determination of how quality education may be attained and whether to pursue same. However, the impact thereof, also as in the "class size" issue, have direct affects on a teacher's working conditions, and therefore, the impact thereof is subject to mandatory bargaining.
>
> Upon appeal, Dane County Circuit Judge Sachtjen upheld the Commission's determination as follows:
>
> > The third proposal submitted by the Association would reduce the number of "contact hours" (ie., hours of contact with students) required of each teacher. The proposal would also establish the number of daily "preparation periods" allowed a teacher and the number of different "ability levels" which a teacher could be called on to teach without being freed from certain supervisory tasks.
> >
> > The Association points out that the number of hours a teacher spends in contact with students, in "preparation periods," and in work on different

"ability levels" directly affects the number of hours which a teacher must work each day. Thus, the Association characterizes the subject of this proposal as one of "work-load."

We recognize that the subjects of the proposal here may have a significant effect on a teacher's total workload. But one could also look at the proposals from another perspective: The Association's proposals relate to the allocation of a teacher's work day. The allocation of the time and energies of its teachers is a consequence of basic educational policy decisions on the part of the District. It is not without reason to conclude that those decisions significantly affect the quality of education offered in the District.

Contrary to the District's assertions herein, in Oak Creek, supra, both the Commission and the court recognized that preparation time does have an impact upon working conditions and hours. However, where a proposal specifies the amount of preparation time to which a teacher is entitled, Oak Creek holds that the educational policy implications outweigh the impact upon teacher's working conditions and hours and, on balance, render the clause permissive.

Unlike the proposal found permissive in Oak Creek, supra, the language at issue herein does not require that the District allocate the teacher day in any specific manner. The language does not mandate that any amount of preparation time be provided. Thus, it cannot persuasively be said that the holding in Oak Creek, supra, renders this proposal a permissive subject of bargaining.

We find the impact of preparation time upon hours is clear. A teacher cannot teach, even poorly, without some knowledge of the subject to be taught. Knowledge of the subject to be taught requires preparation. Preparation requires the expenditure of time by the teacher. Time is either available as a part of the teacher's regular work day or outside the work day. If sufficient time is not available as a part of the work day, time must be spent outside the work day.

. . .

Given the foregoing, we find that the instant proposal is a mandatory subject of bargaining because it primarily relates to wages as well as to the impact upon hours and conditions of employment of District preparation time policy choices.

The Association's proposal herein parallels the structure of the Janesville proposal. Like Janesville and unlike Oak Creek, supra, the District is not required to provide any amount of preparation time. Unlike Blackhawk, supra, the length of a student contact period is not defined. The District remains free to allocate the teacher day in any way it sees fit. The proposal only specifies the economic consequences of the District's exercise of its educational prerogatives.

We therefore find this proposal to be a mandatory subject of bargaining for the reasons set forth in our Janesville decision quoted above.

(4) The disputed proposal is as follows:

ARTICLE X - STAFF REDUCTION POLICY

In the event the Board determines to reduce the number of employe positions (full layoff) or the number of hours in any

position (partial layoff) for the forthcoming school year, the provisions set forth in this Article shall apply. Layoffs shall be made only for the reason(s) asserted by the Board, and not to circumvent the other job security or discipline provisions of this agreement.

. . .

D. Layoff Notices and Effective Date of Layoff.

1. Prior to implementing any layoff(s), the Board shall notify the Association in writing of the position(s) which it is considering for reduction. Thereafter, upon Association request, the Board shall meet with the Association to bargain concerning the impact of any staff reduction(s).

2. Layoffs of teachers shall be implemented in accordance with a time frame consistent with the provisions of sec. 118.22, Stats. The Board shall give written notice to the teachers it has selected for layoff for the ensuring school year on or before March 15 of the school year during which the teacher holds a contract. The layoff of each teacher shall commence on the date that he or she completes the teaching contract for the current school year.

3. The Board shall simultaneously provide the Association with copies of all layoff notices which it sends to employes pursuant to this section.

The District contends that the underlying portions of the proposed clause are primarily related to decisions regarding the management of the District and, therefore, are not mandatory subjects of bargaining. As to the portion of the Association's proposal which links the timing and frequency of teacher layoffs to the provisions of Sec. 118.22, Stats., the District's arguments parallel those found persuasive by the Commission in West Bend Jt. School District No. 1, 18512 (5/81) and thus need not be repeated herein. As to that portion of the Association's proposal which requires that layoffs "shall be made only for the reason(s) asserted by the Board," the District argues that if it may not be required to negotiate the reasons for its decision to layoff, then it should not be necessary for the District to provide a statement of those reasons to the Association. Although the Association may argue that the phrase is limited to considerations of employe discipline or job security, the District asserts that if the Association had reason to believe that layoffs were being made to violate job security or disciplinary provisions of the collective bargaining agreement, the Association could file a grievance and/or a prohibited practice charge, and obtain the desired information from the District response thereto. Given the relationship of the reasons underlying the District's decision to lay off to the very making of the layoff determination, which is clearly reserved to the District, the District asserts that this phrase is primarily related to the management of the District and should be found to be a permissive subject of bargaining.

As to those portions of the layoff proposal which deal with the timing and frequency of teacher layoffs, the Association reiterates those arguments placed before the Commission in West Bend, supra. The Association further argues that the Commission is obligated as a matter of law to follow the decision of the Court of Appeals in West Bend Education Association v. WERC, Case No. 82-1824 (Ct. proposal paralleling that herein was a permissive subject of bargaining. Thus:

that the Association may administer and enforce the proposal's no-circumvention provision. The Association therefore submits that its proposal is a mandatory subject of bargaining.

Discussion of Proposal (4)

In West Bend Joint School District No. 1, 18512, (5/81) the Commission was confronted with the status of the following proposal, the underlined portions of which were in dispute:

ARTICLE XXVII. STAFF REDUCTION

1. If a reduction in the number of teachers for the forthcoming school year is necessary, the provisions set forth in this Article shall apply. The Board may layoff teachers only where such layoffs are made necessary for valid and unlawful reasons of educational policy and/or school system management and operation. The Board agrees that layoffs will be made only for the reasons stated by it, as provided in this paragraph and in paragraph 3, and not to circumvent the other job security provisions contained in this collective bargaining agreement.

   The Board will notify the WBEA of the position(s) which it considers necessary to reduce, together with all of the reasons and the supporting facts relied upon by the Board for the contemplated reduction, prior to the implementation of any layoffs. Such notice shall be sufficiently timely to enable the WBEA, at its option, to discuss with the Board the necessity of the proposed reduction in teaching positions and to bargain concerning the impact of any necessary reduction. Necessary layoffs of teachers shall be accomplished in accordance with the time frame and provisions of Section 118.22, Wis. Stats. The Board shall inform the teacher(s) by preliminary notice in writing that the Board is considering nonrenewal of the teacher's contract for reasons of layoff and shall provide such teacher(s) with the right to a private conference, as provided in Section 111.22, Wis. Stats. Employes nonrenewed under this Article shall have the rights to reemployment set forth in paragraphs 5, 6 and 7 of this Article.

. . .

4. The lay off of each teacher shall commence on the date that he or she completes the teaching contract for the current school year, and such teacher shall be paid for services performed under that contract to the date of such lay off in accordance with this Agreement. Also, if and only if such teacher exercises the conversion privilege under the District's group hospital-surgical insurance program, the District will continue to pay the single or family premium cost for the coverage of the personal medical insurance policy to which such teacher converts through the month of August immediately following the date of such teacher's lay off. Except as

positions . . ." is in the opinion of the Commission clearly permissive.

Our Supreme Court in City of Brookfield held that the decision to layoff municipal employes to implement budget cuts relates to a non-mandatory subject of bargaining, while the impact of said layoffs on the wages, hours and working conditions is a mandatory subject of bargaining. Here the employer has agreed to provide timely notice to enable the Association ". . . to bargain concerning the impact of any necessary reduction". The Association proposes more, however, in that it wants to discuss the actual necessity of any proposed reduction. As such, said proposal clearly primarily relates to the decision of reduction itself and not the impact of same. Since the District has no duty to bargain regarding the layoff decision it follows that it may not be required, as a part of its bargaining duty, to discuss the necessity of said layoffs. We agree with the Association's contention that it may have a constitutional right to be heard on educational policy, such as the need for teacher layoffs. However, as the court stated in Brookfield the bargaining table is not the appropriate forum for the formulation or management of public policy.

As to the remaining disputed portions of the Association's proposal, the threshold question, given the Brookfield decision, is whether said proposal, which concerned the timing and frequency of layoffs, are (sic) an integral part of the layoff decision and the public policy determinations leading to said decision and the implementation thereof 3/, or whether it is primarily related to the impact of the decision. We conclude that proposals relating to the timing and frequency of layoffs interfere with the actual decision concerning same and thus effectively prevents (sic) the municipal employer from implementing public policy which the Commission and the Supreme Court have already determined constitute non-mandatory subjects of bargaining.

Here, we disagree with the Association's contentions that its layoff proposal which requires teacher layoffs to be accomplished in accordance with Section 118.22, Stats., is merely procedural and not primarily related to the layoff decision and, further, is similar to matters as to who will be laid off, which was found to be a mandatory subject of bargaining in Beloit 4/. A seniority provision, unlike the proposal herein, which provides for the timing of the layoff decision and its implementations, (sic) does not unduly interfere with the layoff decision by having to adhere to the time frame of Section 118.22, Stats., in deciding and implementing layoffs. Under the Association's proposal the District may have to either delay layoffs or initiate layoffs in advance of the facts and circumstances that necessitates (sic) the layoff, e.g. reductions in state and federal aid or unanticipated enrollment declines.

The Association's reliance on Mack for the proposition that the layoff proposal at issue herein is a mandatory subject of bargaining is misplaced, since the mandatory versus permissive nature of the layoff provision was not at issue in Mack. Therein the Court's focus was on the alleged illegality of the layoff provision to the extent that it was inconsistent with Section 118.22, Stats. When the court in Mack referred to the layoff provision as a mandatory subject of bargaining, it did so in the context of its decision in Beloit, which we have already distinguished from the proposal at issue herein. We agree with the District that the Court in Mack dealt with the distinction between layoff and non-renewals, pursuant to Section 118.22, Stats., and that the issues presented herein are controlled by the Court's decision in Brookfield.

The Commission concludes that the Association by tying the timing and frequency of layoffs of Section 118.22, imposes an unwarranted restriction upon the employer's right to lay off personnel. The Association's proposal and its reliance on Section 118.22 requires a preliminary notice and the right to private conference, before the layoff decision, all within a narrow specified time period during the school year 5/ and further limits the layoff to the end of the school year. Thus the Association's proposal requires more than just notice of impending layoffs but rather interferes with the Employer's right to determine when layoffs are to occur. We therefore conclude that the Association's proposal is primarily related to the formulation, implementation and management of public policy and not primarily related to wages, hours and conditions of employment.

3/ The Commission has previously held that the determinations as to class size and student teacher ratios City of Beloit Schools, (11831-C) 9/74), affirmed sub nom City of Beloit v. WERC 73 Wis. 2d 43 (1976); the establishment or maintenance of certain employe positions City of Waukesha (Fire Department) (17830) 5/80 and Milwaukee Board of School Directors (17504 - 17508) 12/79; minimum manpower requirements City of Manitowoc (Fire Department) (18333) 12/80 and City of Brookfield (11489-B, 11500-B) 4/75; and the level of services City of Brookfield (17947) 7/80 non-mandatory subjects of bargaining because they relate primarily to the formulation or management of public policy.

4/ In Beloit a proposal which provided for layoffs by seniority - "inverse order of the appointment of such teachers" - was found to be a mandatory subject of bargaining.

5/ Section 118.22(2) provides that "on or before March 15 of the school year . . . the board shall give the teacher written notice of renewal or refusal to renew his contract . . ." Section 118.22(3) provides that "At least 15 days prior to giving written notice of refusal to renew a teacher's contract for the ensuing school year, the employing board shall inform the teacher by preliminary notice in writing that the board is considering nonrenewal of the teacher's contract and that, if the teacher files a request with the board within 5 days after receiving the preliminary notice, the teacher has the right to a private conference with the board prior to being given written notice of refusal to renew his contract."

Upon appeal in Washington County Circuit Court, Circuit Judge J. Tom Merriam affirmed the Commission's conclusion that there was no duty to bargain as to that

accordance with a time frame consistent with the provisions of sec. 118.22, Stats., is a mandatory subject of bargaining within the meaning of sec. 111.70(1)(d), Stats., and the declaratory ruling of the WERC to that extent is hereby reversed.

IT IS FURTHER ADJUDGED that the Petitioner's proposal regarding the effective date of the implementation of teacher layoffs, which provides that the layoff of each teacher shall commence on the date that he or she completes the teaching contract for the current school year, constitutes a mandatory subject of bargaining within the meaning of sec. 111.70(1)(d), Stats., and the declaratory ruling of the WERC to that extent is hereby reversed.

The Commission and the District sought an appeal of the aforementioned portions of the Circuit Court's order. On October 25, 1983, the Wisconsin Court of Appeals, District II, in an unpublished decision, affirmed the Circuit Court's Order concluding:

> The Wisconsin Employment Relations Commission and West Bend Joint School District No. 1 appeal a judgment reversing in part a WERC declaratory ruling and holding that the district had to bargain a teacher layoff proposal made by the West Bend Education Association. The association proposed that the district comply with sec. 118.22, Stats., 1/ in laying off teachers and that layoff occur when the teaching contract ends. We conclude that affirmance of the judgment is mandated by Mack v. Joint School District No. 3, 92 Wis. 3d 476, 285, N.W.2d 604 (1979).
>
> In areas in which the WERC has special knowledge and expertise, a court will give deference to its conclusions unless they are without reason or are inconsistent with the purpose of the law. City of Milwaukee v. WERC, 43 Wis. 2d 596, 602, 168 N.W.2d 809, 812 (1969). Although a court should give great weight to the WERC's interpretation of statutes, it is not bound by them. Village of Whitefish Bay v. WERC, 103 Wis. 2d 443, 448, 309, N.W. 2d 17, 20 (Ct. App. 1981).
>
> Here we may not defer to the WERC's interpretation because it is contrary to Mack. Once a layoff clause was included in prior collective bargaining agreements between the West Bend School District and the teachers, such a clause became a mandatory subject of bargaining. See Mack, 92 Wis. 2d at 488-92, 285 N.W.2d at 610-11. Without a bargained provision regulating the timing and implementation of layoffs, the district would be bound by the refusal to renew provision of sec. 118.22. 2/ See id.

On January 17, 1984, the Wisconsin Supreme Court granted the Commission's petition for review of the Court of Appeals decision.

Turning to the specifics of the Association's proposal, the Commission commences its consideration by stating that it remains the opinion of the Commissioner that the Commission's decision in West Bend is applicable to the portion of Section 1 which refers to layoffs for the upcoming year and to Section D(2) of the Association's proposal. 2/ The Commission, given the pendency of the appeal before the Wisconsin Supreme Court, does not believe itself to be bound by the unpublished Court of Appeals decision which upheld Judge Merriam's reversal of the Commission's initial determinations as to these matters. Thus, those provisions are permissive subjects of bargaining for the reasons quoted earlier.

As to the District's objections which focus on the requirement that layoffs be made only for the reasons specified by the District, we find the District's

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2/ See Commissioner Gratz' concurring opinion which follows.

objections to be unpersuasive. Once the District has determined that a layoff is required, that determination is premised upon some reason the revelation of which can in no way intrude upon the decision itself, which has already been made. As the Association notes, the right to know the reasons for a layoff provide the Association, and the employes it represents, with an opportunity to insure that the provisions of the agreement are followed and that the District is not utilizing a layoff to circumvent other provisions of the contract. The District's contention that the Association can always police the agreement by utilizing the grievance procedure does no more than establish that there are many approaches which a union may take when seeking to obtain and insure compliance with a contract. As the Association has also aptly noted, the reasons for a layoff constitute relevant information to which the Association is entitled so that it may have the opportunity to bargain the impact of the layoff, if appropriate. As we have noted in Sewerage Commission of the City of Milwaukee, 17302 (9/79); Milwaukee Board of School Directors, 20093-A (2/83) and Racine Unified School District, 20652-A and 20653-A, (1/84) the union has the right to obtain copies of permissive subject decisions, rules or policies taken or enacted by the employer in order that it may bargain on the impact thereof. In Racine, supra, we concluded that a proposal which specified that the union shall be given copies of all such decisions so that it could bargain the impact was itself a mandatory subject of bargaining. In conclusion, we see no significant intrusion into District prerogatives and find that the objected to proposal has a significant relationship to employe job security and conditions of employment concerns. Therefore, we have found the provision to be a mandatory subject of bargaining. We note in closing that in our view the proposal does not constitute an attempt by the majority representative to bargain over the decision to lay off employes.

Concurring Opinion of Commissioner Gratz Concerning Proposal (4)

I am separately concurring as regards the status of Article X, Sec. D(2) of the Association's Staff Reduction proposal requiring that layoffs of teachers be implemented in accordance with a time frame consistent with the provisions of Sec. 118.22, Stats., that the Board give written notice to the teachers it has selected for layoff on or before March 15, and that the layoff of each teacher shall commence on the date he or she completes the teaching contract for the current school year.

I wish to make it clear that I agree with my colleagues' holding herein that those proposal portions are nonmandatory subjects of bargaining only if and so long as the majority opinion in Mack remains a controlling precedent.

Understandably, the parties and the Commission in its decision, above, have all approached these issues on the premise that the majority opinion in Mack is a controlling interpretation of the relationship between MERA and Sec. 118.22. However, Mack was a 4-3 decision, there have been post-Mack changes in the composition of the Supreme Court, and that Court has recently accepted West Bend on Certiorari. In the event that the foregoing may signal a possible reconsideration of underlying viability of the majority opinion in Mack, it seems to me worth noting my view that if the dissenting opinion in Mack were to become the controlling rule of law, then the above-noted proposals would be mandatory subjects of bargaining as written.

The three dissenting Justices in Mack argued that the job security provided by the individual teaching contract provisions and related procedural requirements of Sec. 118.22, Stats., (as it then read) ought not be subject to diminution or change through bargaining, individual or collective, mandatory or nonmandatory. So viewed, Sec. 118.22 would render an unlimited Brookfield right to lay off inapplicable to employes covered by that Section and would, instead, require compliance with the provisions of Sec. 118.22 as the means--aside from discharges--for affecting the job security of employes covered by Sec. 118.22. The Legislature's post-Mack addition of Sec. 118.22(4), Stats., would enable permissive subject bargaining to alter those statutory job security provisions, but it would not permit either party to compel collective bargaining on such matters.

Accordingly, given the addition of Sec. 118.22(4), if the Mack dissent were to become the controlling rule of law, then layoff proposals concerning teachers covered by Sec. 118.22 which deviate from the time frame and other job security protections set forth in Sec. 118.22 would be permissive subjects of bargaining,

but proposals such as those at issue herein that conform precisely to Sec. 118.22 would be mandatory subjects of bargaining.

Given the present state of the law, however, the instant proposal must be viewed in the context of the Mack majority's perspective that statutory non-renewal and layoff are processes wholly independent from one another. In that context, Sec. 118.22 constitutes no impediment to applying the Brookfield rule to layoffs of Sec. 118.22-covered teachers, the same as it would be applied to layoffs of any other MERA-covered employes. Since--for the reasons noted by the Commission in West Bend--the instant proposal portions do impermissibly interfere with a Brookfield right to lay off, the instant proposals are nonmandatory subjects of bargaining.

In sum, so long as the Mack majority opinion remains the law, the District enjoys a Brookfield right to lay off despite the language of Sec. 118.22, and proposals of the sort involved herein are nonmandatory subjects because they impermissibly interfere with the District's exercise of that right. If the Mack dissent becomes the law, however, the instant proposals would be mandatory subjects of bargaining because Brookfield would be rendered inapplicable to employes covered by Sec. 118.22.

Dated at Madison, Wisconsin this 4th day of April, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

I separately concur as to proposal (4) and fully concur as to the remaining proposals.

_____
Marshall L. Gratz, Commissioner